Supreme Court, U.S.
FILED

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NO.

In The SUPREME COURT of the UNITED STATES

ROBERTO GONZALEZ and GLORIA HOLLAND
Petitioners

v.

NICHOLAS KOKOT and DEVERICK DIXON
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit erred by not applying the Third Circuit's two prong test to determine whether, under *Town of Rumery v. Newton*, releases of civil rights claims were void as against public policy, to wit: whether the civil rights claims objectively appeared to be frivolous or marginal and whether the prosecutor was subjectively motivated by the civil rights claim appearing to be frivolous or marginal?

2. Whether, under *Town of Rumery v. Newton*, the defendants' burden to prove that releases of civil rights claims are enforceable is by clear and convincing evidence, or is only by a preponderance of the evidence?

STATEMENT PURSUANT TO RULE 29.6

The plaintiffs-petitioners are Roberto Gonzalez and Gloria Holland. The defendants-respondents are Nicholas Kokot and Deverick Dixon, now known as Yanci Mumba. There are no corporate parties.

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STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered by the Court of Appeals for the Seventh Circuit on December 27, 2002. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment to the United States Constitution states that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment to the United States Constitution states, in relevant part, that:

> Section 1....No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United Stated, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983 states, in relevant part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity,

> or other proper proceeding for redress....

Indiana Code Section 35-44-3-3(a)(1), "Resisting law enforcement," states that:

> (a) A person who knowingly or intentionally (1) forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of his duties as an officer.

Indiana Code Section 35-45-1-3(2), "Disorderly conduct," states that:

> A person who recklessly, knowingly or intentionally...(2) makes unreasonable noise and continues to do so after being asked to stop.

STATEMENT OF THE CASE

The defendants, Nicholas Kokot and Deverick Dixon, were police officers who arrested the plaintiffs, Roberto Gonzalez and Gloria Holland for disorderly conduct and for forcibly resisting, obstructing or interfering with a law enforcement officer under Indiana Code (IC) Sections 35-45-1-3-(2) and 35-44-3-3(a)(1), respectively. Gonzalez and Holland signed a release of all claims against the defendants and the criminal charges were then dismissed. Thereafter, the plaintiffs filed a law suit against Kokot and Dixon under 42 U.S.C. Section 1983 for arresting them without probable cause, and for the use of excessive force against Gonzalez, in violation of their Fourth and Fourteenth Amendment rights.

The district court had jurisdiction pursuant to 28 U.S.C. Section 1343 and 42 U.S.C. Section 1983.

The district court granted summary judgment to the defendants based upon the release.

The plaintiffs filed a timely notice of appeal and invoked the jurisdiction of the Court of Appeals pursuant to 28 U.S.C. Section 1291, as the district court had disposed of all claims.

The plaintiffs asked the district court and the Seventh Circuit to use the Third Circuit's test to determine whether, under *Town of Rumery v. Newton*, releases of civil rights claims are void as against public policy, to wit: whether the civil rights claims appeared to be frivolous or marginal when viewed objectively and whether the prosecutor was subjectively motivated by the civil rights claim appearing to be frivolous or marginal. However, neither the district court, nor the Seventh Circuit applied the Third's Circuit's test.

The plaintiffs also asked the district court and the Seventh Circuit to adopt a standard requiring that

defendants, in these circumstances, prove the validity of a release by clear and convincing evidence. The district court presumably did not use that standard, as it was silent concerning the burden of proof, and the Seventh Circuit rejected the plaintiff's position and held that only a preponderance of the evidence was required to prove the validity of the release.

In order to demonstrate that the plaintiffs' civil rights claims were far more than frivolous or marginal, and were in fact, strong, the plaintiffs relied on the depositions of Kokot and of Dixon that were taken in the criminal proceedings against the plaintiffs. According to the defendants' deposition testimony in the criminal case, the facts leading to their arrests of the plaintiffs were as follows. Kokot and Dixon were East Chicago, Indiana, police officers who went to a single family residence and moved wood from the street on to the parkway in front of the home. Gonzalez then opened the door of the home and complained about the wood being put on the lawn. Kokot responded that Gonzalez needed to talk to city officials if he wanted the wood moved. From the doorway, Gonzalez continued to complain about the wood and supposedly started to use swear words while speaking loudly enough to be heard by the neighbors.

Kokot then approached Gonzalez, who was still in the doorway, and asked him to repeat his previous statement. Gonzalez supposedly shouted at Kokot, using an obscenity. According to Kokot, he told Gonzalez to lower his voice and redirect his anger or he would be arrested. However, according to Dixon, Kokot did not warn Gonzalez to lower his voice, and only told Gonzalez to stop "talking language like this" or be arrested.

Gonzalez allegedly began to yell belittling comments at Kokot and turned his back and placed

his hands behind his back as if he was being arrested. Kokot then attempted to handcuff Gonzalez. Having listened to everything, Dixon admittedly did not know why his partner was arresting Gonzalez.

Gonzalez was said to have resisted, while Kokot was trying to cuff him, by restraining his left arm and trying to pull away from Kokot and then leaning back into Kokot. Kokot put Gonzalez on the ground, and Gonzalez tried to stand up. Kokot stopped Gonzalez from standing up and finished cuffing him.

While Kokot was trying to cuff Gonzalez, Holland came out of the house and tried to position herself between them. According to Dixon, Holland grabbed Gonzalez's uncuffed arm and said, "don't take him, please." Dixon told her to get out of the way, Holland said, "no I ain't going nowhere," and Dixon grabbed her arm, led her off the steps, and arrested her.

Twice, Holland allegedly pulled one of her arms away from Dixon while he was cuffing her, so he put her on the ground and finished cuffing her. Holland was admittedly never violent.

There was no evidence that any neighbor complained about, or particularly reacted to, Gonzalez's speech.

The disorderly conduct charge against Holland was based on her allegedly cursing. But, in their depositions in the criminal case, neither defendant testified that Holland ever cursed. Nor did their depositions describe Holland as yelling or making a loud noise.

While the criminal charges were pending against the plaintiffs, their attorney served a Notice of Tort Claim on the City of East Chicago alleging that they were arrested without probable cause, and that they were subjected to excessive force, in violation of their constitutional rights. The prosecutor was

informed of the tort claim.

Releases of all tort claims, including civil rights claims against Kokot and Dixon, were drafted by a city attorney. The prosecutor participated in obtaining signed releases out of a concern to protect Kokot and Dixon. He knew that it was important to them to be released from liability. The prosecutor admitted that "the real issue" was the tort claim because he wanted Kokot and Dixon to approve what he was going to do, and they wanted releases if the charges were going to be dismissed. The prosecutor admitted that had there been no tort claim, "a straight dismissal" would "probably" have been "a realistic, potential, appropriate disposition of the charges" in a case like the one against Gonzalez and Holland. The prosecutor also acknowledged that in cases with a potential tort claim, absent a release, he would want a guilty plea, not just a dismissal, in order to help the police officers defend against any potential tort claim.

Gonzalez and Holland signed the release and the criminal charges against them were dismissed by the prosecutor.

There is no evidence that the criminal court judge was told anything about the civil releases of tort liability.

REASONS FOR ALLOWING THE WRIT

I. Certiorari Should Be Granted Because Courts Of Appeal Are In Conflict As To The Means For Determining When Releases Of Civil Rights Claims Are Void As Against Public Policy.

Releases given in return for criminal dismissals are unenforceable if they violate public policy, given the particular facts of the case. *Town of Newton v. Rumery*, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d

405 (1987).

The Third and Seventh Circuits are in conflict as to the proper analytical framework which should be utilized to effectuate that rule of law. As a result, *Rumery* is applied inconsistently and the outcome of a case can be a matter of where the case happens to be heard.

In the Third Circuit, a two-prong test is used to determine whether evidence of police misconduct invalidates releases of civil rights claims. *Cain v. Darby Borough*, 7 F.3d 377, 383 (3d Cir. 1993); *Livingstone v. North Belle Vernon Borough*, 91 F.3d 515, 527-29 (3d Cir. 1996); *Kinney v. City of Cleveland*, 144 F.Supp. 2d 908, 918-19 (N.D. Ohio 2001). Under the Third Circuit's test, the defense normally must establish: (1) that there was an objective showing that the released civil rights claims appeared to be marginal or frivolous when the agreement was made; and (2) that the prosecutor was subjectively motivated by the civil rights claims appearing to be marginal or frivolous. *Cain v. Darby Borough*, 7 F.3d 377, 383 (3d Cir. 1993); *Livingstone v. North Belle Vernon Borough*, 91 F.3d 515, 527-29 (3d Cir. 1996); *Kinney v. City of Cleveland*, 144 F.Supp. 2d 908, 918-19 (N.D. Ohio 2001).[1]

A. The Seventh Circuit's Decision Conflicts With The Objective Prong Of The Third Circuit's Test.

In contrast, the Seventh Circuit applied, in part, a test of whether "there was enough evidence to

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1. Under the Third Circuit's analysis, the objective requirement might be relaxed in cases where there is an unusually compelling public interest reason to enforce the release. *Cain*, 7 F3d. At 383; *Livingstone*, 91 F.3d at 529, n.16 (3d Cir. 1996).

send the criminal case to trial." *Gonzalez*, 314 F.3d at 320. The Seventh Circuit also referred to the criminal charges as "colorable." *Gonzalez*, 314 F.3d at 320. That is significantly different than whether the civil rights claims appeared to be frivolous or marginal when viewed objectively.

Furthermore, the Seventh Circuit's test, unlike that advanced by the plaintiffs and used by the Third Circuit, is entirely inapplicable to the claim of excessive force. Unlike probable cause, excessive force is not related to whether the criminal charges were colorable or triable.

Not only is it important for the analytical disparity between the circuits to be resolved, it is important that courts of appeal have a structured, specific analytical framework. The two-prong test provided by the Third Circuit meets that need.

The Seventh Circuit's failure to apply the objective prong of the Third Circuit's test determined the outcome of the instant case and will determine the outcome of cases in the future. The depositions given by Kokot and Dixon, in the criminal case, objectively show that the plaintiffs' civil rights claims are not marginal or frivolous. As to Gonzalez, according to Dixon, an essential element for probable cause to arrest for disorderly conduct, a warning to quiet down, was never given.[2] Additionally, probable cause to arrest Gonzalez for disorderly conduct was lacking because his speech was political, regardless of whether he was loud or obscene, since he was

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2. The essential elements of disorderly conduct under IC Section 35-45-1-3(2) are (1) acting recklessly, knowingly or intentionally; (2) that the noise was unreasonable; and (3) that the noise was unreasonable both before, and after, an official warning to lower the noise. *Whittingham v. State*, 669 N.E.2d 1363, 1370 (Ind. 1996).

complaining about the city putting the wood on his grass and the city's failure to remove the wood after being asked to do so.[3] As to Holland, the officers' accounts lacked any of the elements of the disorderly conduct charge. As to the forcibly resisting charges, the officers' accounts merely described passive, non-forcible resistance, so that the essential element of acting forcibly was absent.[4] Without the essential elements of the offense, there could not be probable cause to arrest. Furthermore, there was an utter lack of evidence upon which to conclude objectively that Gonzalez's claim of excessive force was marginal or frivolous.

That the differences between the Third Circuit

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3. Under Indiana law, noisy political expression, regardless of whether it is loud or obscene is rebuttably presumed not to be disorderly conduct, and that presumption can only be overcome by demonstrating that the impairment of the speech was slight or that the speech threatened a particular harm analogous to a tortious injury on an identifiable private interest. *Whittingham v. State*, 669 N.E.2d 1363, 1370 (Ind. 1996); *Price v. State*, 622 N.E.2d 954, 957, 960-61 and 964 (Ind. 1993). Indiana defines political speech as speech which refers to government action, regardless of whether the speech is obscene or profane or otherwise inappropriate. *Whittingham v. State*, 669 N.E.2d 1363, 1370 (Ind. 1996); *Price v. State*, 622 N.E.2d 954, 957, 960-61 and 964 (Ind. 1993).

4. An essential element of forcibly resisting, obstructing or interfering with a law enforcement officer, under IC Section 35-44-3-3(a)(1) is that the conduct is forcible. *Spangler v. State*, 607 N.E.2d 720, 723-724 (Ind. 1993). Under Indiana law, forcible means "when strong, powerful, violent means are used to evade a law enforcement official's rightful exercise of his or her duties" and neither passive resistance, nor non-forcible, albeit "active" resistence, meets the statutory threshold. *Spangler*, 607 N.E.2d at 723-724; *Ajabu v. State*, 704 N.E.2d 494, 495 (Ind. Ct. App. 1998).

and the Seventh Circuit lead to different outcomes underscores the importance of having this Court resolve which test should be used to determine whether releases of civil rights claims are void as against public policy.

B. The Sixth Circuit May Be In Conflict With Both The Seventh Circuit And The Third Circuit.

In addition to the clear conflict between the Third and the Seventh Circuit, they both may be in conflict with the Sixth Circuit. In *Coughlen v. Coots*, 5 F.3d 970, 974 (6th Cir. 1993), the Sixth Circuit indicated that substantial evidence of police misconduct means that a prosecutor should not obtain a civil rights release and that such a release should not be enforced. *Id.*, 5 F.3d at 974. While that is true, if substantial evidence of police misconduct is the threshold which must be reached, that conflicts with the Third Circuit's test of the civil rights claim not appearing to be marginal or frivolous. But, a test of substantial evidence of police misconduct is also different than the Seventh Circuit's criteria of criminal charges being triable or colorable. There can be both police misconduct and triable criminal charges. This further illustrates the disparate nature of the ways in which *Rumery* is being interpreted and implemented.

C. The Seventh Circuit's Decision Conflicts With The Subjective Prong Of The Third Circuit's Test.

While the Seventh Circuit did appear to consider the prosecutor's motives, it did not follow the standard promulgated by the Third Circuit and urged by the plaintiffs. The Seventh Circuit correctly indicated that the prosecutor could consider the

merits of potential civil rights claims. *Gonzalez*, 314 F.3d at 320. But, that vague statement falls far short, and is substantially different than the second prong of the Third Circuit's test which requires that the defense prove the prosecutor was subjectively motivated by the civil rights claim appearing to be frivolous or marginal.

This difference in analysis is also outcome determinative. To effectuate the subjective prong of the Third Circuit's test, releases should not be obtained from criminal defendants if the prosecutor acts "out of concern for the private interests of government officials" or is motivated "by a desire to protect the relevant police officers." *Cain*, 7 F.3d at 381 and *Livingstone*, 91 F.3d at 533. In the case at bar, the prosecutor admittedly acted to protect the interests of Kokot and of Dixon and obtained releases, even though he conceded that, without the tort claims, a "straight dismissal" would "probably" have been "a realistic, potential, appropriate disposition of the charges." As a result, the criminal justice process became subordinated to the private interests of the arresting officers. Protecting the public interest against such subordination requires that the releases not be enforced under the Third Circuit's test, but not under the Seventh Circuit's method.

II. This Court Should Resolve Whether The Burden Of Proof To Establish That Releases Of Civil Rights Claims Are Valid Is By Clear And Convincing Evidence Or Is Merely By A Preponderance Of The Evidence.

Under *Town of Newton v. Rumery*, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987), the burden of proof is on the defendant to demonstrate

that a release of a civil rights claim is enforceable, both because it was voluntary and because its enforcement is consistent with the public interest. In the Third Circuit, clear and convincing evidence is required, at least to prove the voluntariness of an oral release. *Livingstone v. North Belle Vernon Borough*, 91 F.3d 515, 534-36 (3d Cir. 1996). *Livingstone* did not decide whether the same standard applied to written releases. *Id.* at 536, n.34. However, a significant portion of the *Livingstone* court's rationale is equally applicable to a written release of a civil rights claim. A higher standard of proof is appropriate where "particularly important individual interests or rights are at stake." *Livingstone*, at 535. Successful civil rights cases " do more than compensate injured plaintiffs, they serve the important public purpose of exposing and deterring official misconduct, and thereby protecting the right of the public at large. In *Rumery*, all nine Justices recognized the importance of ensuring that release-dismissal agreements do not encroach upon this purpose." *Livingstone*, at 535. *See Grogan v. Garner*, 498 U.S. 279, 286, 111 S.Ct. 654, 659, 112 L.Ed.2d 755 (1991). Furthermore, those public concerns are likely to be frequently disregarded in trading dismissals of criminal charges for civil releases. This is because the incentive to avoid a criminal prosecution, even for an innocent person, can readily outweigh the potential benefit of maintaining a right to prosecute a civil rights case. This is particularly true where the compensatory damages may be relatively small.

These reasons for the standard of proof being clear and convincing are equally applicable to the defendants' burden to prove that enforcement of the release is consistent with public policy. *See Rumery*, 480 U.S. at 392 and 401, 107 S.Ct. at 1191 and 1196.

In the present ca , the Seventh Circuit, although it was dealing with a written release, recognized a conflict between the Third and Sixth Circuits on the standard required to prove the validity of the release, and agreed with the Sixth Circuit that the burden is satisfied by a preponderance of the evidence. *Gonzalez*, 314 F3d. at 318-19. *See Burke v. Johnson*, 167 F.3d 276, 286 (6th Cir. 1999).

The standard of proof, both as to voluntariness, as well as to the public interest, is an important issue. The outcome of cases can be determined by whether the standard is a preponderance or clear and convincing evidence. That issue needs to be resolved by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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NO. 02-1514

IN THE
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ROBERTO GONZALEZ and
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Plaintiffs-Appellants

v.

NICHOLAS KOKOT and
DEVERICK DIXON

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division
No. 01 C 304-Allen Sharp, *Judge*

KANNE, *Circuit Judge.*

This appeal comes to us from a grant of summary judgment in favor of two East Chicago, Indiana police officers. A Chicago, Illinois police officer and his friend brought this § 1983 lawsuit, alleging that their constitutional rights had been violated when the East Chicago officers wrongfully arrested them and used excessive force in doing so. This lawsuit by Roberto Gonzalez and Gloria Holland faced an immediate hurdle, however, given that they had previously executed releases of any claims they might have had against the East Chicago officers. They nevertheless proceeded with their lawsuit, on the theory that the releases they signed were invalid and unenforceable either as a matter of contract law or as violating public policy. Because we agree with the

district court that the releases are valid and thus fully enforceable, we affirm the grant of summary judgment.

I. History

A. The Arrest of Gonzalez and Holland

The § 1983 claims asserted by Gonzalez and Holland arose out of an April 10, 1999 incident that began when Officers Nicholas Kokot and Deverick Dixon[1] were dispatched to an address on Drummond Avenue in East Chicago, Indiana. Upon their arrival, the two officers began to move pieces of wood and concrete sitting in the street onto the grassy area between the street and the sidewalk. Gonzalez, apparently unhappy with the transfer of the wood from the street to a position in front of his house, opened the door of his home and complained to the officers that the wood was damaging his lawn. The officers responded that if Gonzalez wanted the wood removed, he would have to speak with city officials.

From this point, the precise details of the encounter are somewhat unclear, but it is undisputed that Gonzalez and the officers continued to exchange words. According to the version advanced by Gonzalez, he initially spoke to the officers in a calm, measured tone, but as the interchange continued, Gonzalez admits to raising his voice, apparently making liberal use of profanity throughout the exchange. There is some disagreement as to the exact warning Officer Kokot then gave Gonzalez; Kokot

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1. Deverick Dixon has since had his name legally changed to Janci Mumba. As a matter of convenience, this opinion will continue to refer to him as Dixon, as did the district court.

asserts that he told Gonzalez to lower his voice, redirect his anger, or be arrested. Gonzalez claims that Kokot said nothing about lowering his voice. Gonzalez admits that he then began to belittle Kokot, and that in doing so he was "yelling, but not 'at the top of top of [*sic*] his lungs.' " (Appellant Br. at 8.)

The interchange between Gonzalez and the officers culminated in Officer Kokot's attempt to arrest Gonzalez. Gonzalez acknowledges resisting Kokot's effort to handcuff him, holding back his unrestrained arm to avoid being cuffed and attempting to stand up after Kokot put him on the ground. During this arrest attempt, Gonzalez's companion Gloria Holland came out of the house and attempted to position herself between Kokot and Gonzalez, asking the officers not to arrest him while she grabbed Gonzalez's uncuffed arm. She refused Dixon's request to stop interfering with Gonzalez's arrest, which led Dixon to grab her arm and arrest her as well. Holland twice withdrew her arm from his attempt to handcuff her, leading Dixon to place her on the ground to finish handcuffing her.

Gonzalez was charged with disorderly conduct in violation of Indiana Code § 35-45-1-3(2),[2] and with forcibly resisting, obstructing, or interfering with a law enforcement officer in violation of Indiana Code § 35-44-3-3(a)(1).[3] Holland was charged solely with

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2. Section 35-45-1-3(2) provides that "[a] person who recklessly, knowingly, or intentionally ... makes unreasonable noise and continues to do so after being asked to stop ... commits disorderly conduct." Ind.Code § 35-45-1-3(2) (2002) .

3. Section 35-44-3-3(a)(1) provides: "A person who knowingly or intentionally ... forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of his duties as an

resisting law enforcement. The charges against Gonzalez and Holland were brought in East Chicago City Court, where Gerald Kray, a Deputy Prosecuting Attorney for Lake County, was assigned the case. The defendants retained attorney Jeffrey Schlesinger.

B. The Releases

On or about February 28, 2000, while the criminal charges against Gonzalez and Holland were pending, their attorney Schlesinger served the City of East Chicago with a Notice of Tort Claim, asserting the claim that Officers Kokot and Dixon had arrested Gonzalez and Holland without probable cause and with the use of excessive force, violating their constitutional rights. Schlesinger also told prosecutor Kray of the tort claim, and Kray relayed this information to the East Chicago Law Department, as apparently was his practice, by calling Roy Dominguez, corporation counsel for East Chicago. Thus, Kray became aware of the civil rights claim to be filed by the defendants.

According to Schlesinger, he initiated plea discussions with Kray sometime after the charges were filed. During these discussions, Schlesinger told Kray that Gonzalez was a Chicago police officer and that Gonzalez would face job repercussions if he were found guilty or were to plead guilty. At some point, the issue of releases was introduced into the discussions. According to Kray, it was Schlesinger who first offered signed releases of claims if Kray would agree to a plea arrangement that led to a

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officer ... commits resisting law enforcement ...." Ind.Code § 35-44-3-3(a)(1) (2002) .

dismissal of the charges against his clients. Schlesinger, on the other hand, testified that Kray indicated that it was the City of East Chicago that was requiring releases from the defendants in return for its consent to a dismissal of the charges. Kray also testified that it was his practice to obtain the consent of the arresting officers before dismissing any criminal charges and that Kokot and Dixon wanted releases from Gonzalez and Holland before they would provide their consent to any dismissal.

In any event, the prosecutor, Schlesinger, and Kokot and Dixon reached an agreement providing for dismissal of the criminal charges in exchange for the release of any claims by Gonzalez and Holland--an arrangement known as a release-dismissal agreement. Sometime after the issue was introduced into the plea discussions, releases were prepared by the East Chicago Law Department and forwarded to Schlesinger. The releases were signed by Gonzalez and Holland, in the presence of their lawyer, on June 14, 2000. The releases provide in part:

> For the sole consideration of ZERO ($0.00) dollars, the receipt and sufficiency whereof is hereby acknowledged, the undersigned hereby releases and forever discharges Nicholas D. Kokot, Officer, Officer Deverick Dixon, Frank Acala, Chief of Police, Mayor Robert A. Pastrick, Office of the City Attorney, East Chicago Police Department and the City of East Chicago ... from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, and particularly on account of all injuries, known or unknown, both to person and property, which have resulted or may in the future develop from an accident which occurred on or about the 10th day of

August, 1999, at 3723 Drummond Street, East Chicago, Indiana ....

(Pl.'s Ex. 1 & 2.) Schlesinger delivered the executed releases to Kray in court on the day the criminal charges against Gonzalez and Holland were dismissed.

C. The § 1983 Lawsuit

On April 19, 2001, less than one year after the dismissal of criminal charges against them, Officer Gonzalez and his friend Holland brought this § 1983 suit against Officers Kokot and Dixon, raising their original Fourth Amendment claims. Kokot and Dixon moved for summary judgment, raising the executed releases as an affirmative defense to these claims.

In opposing the officers' motion for summary judgment, Gonzalez and Holland argued that the releases they signed were not supported by consideration and thus invalid under traditional principles of contract law. Additionally, they argued that even if the releases were contractually valid, they were nonetheless unenforceable as against public policy. The district court held that the releases were valid and thus barred the lawsuit, noting "[t]his Court has no doubt whatsoever that these plaintiffs executed these releases freely and voluntarily and with the advice of counsel, and that these releases are valid and enforceable." The district court accordingly entered summary judgment in favor of Kokot and Dixon.

II. Analysis

We review a grant of summary judgment *de novo,* viewing all the facts, and drawing inferences from those facts, in a light most favorable to the

nonmoving party. *Furnish v. SVI Systems, Inc.*, 270 F.3d 445, 448 (7th Cir.2001) . Gonzalez and Holland argue that summary judgment in favor of the arresting officers was improper, essentially raising the same arguments presented to the district court in opposition to the motion: that the releases they executed were invalid and unenforceable--and therefore imposed no bar to their lawsuit. Gonzalez and Holland contend that the prosecutor in their case was aware that Kokot and Dixon did not have probable cause to arrest them, that the prosecutor should have thus simply dismissed the charges against them rather than act as the private representative of the arresting officers in securing the releases, and that the releases were not subject to judicial supervision as they were not made part of the record in the criminal case when the charges were dismissed.

A. Indiana Contract Law

We first consider the appellants' argument that the releases they signed are invalid under Indiana contract law. Under Indiana law, a valid release bars any subsequent lawsuit on the claims covered by the release. *McWaters v. Parker,* 995 F.2d 1366, 1370 (7th Cir.1993) (citing *Lechner v. Reutepohler,* 545 N.E.2d 1144, 1147 (Ind.Ct.App.1989)). It is not disputed that the language of the releases at issue here, if valid, would cover and bar the claims asserted by Gonzalez and Holland against the officers.

Instead, the appellants argue that the releases are invalid. "Under Indiana law, release agreements are to 'be interpreted in the same manner as any other contract document, with the intention of the parties regarding the purpose of the document

governing.'" *Deckard v. Gen. Motors Corp.*, 307 F.38 556, 562 (7th Cir.2002) (quoting *Huffman v. Monroe County Cmty. Sch. Corp.*, 588 N.E.2d 1264, 1267 (Ind.1992)). Indiana law requires that a release be supported by consideration to be valid. *Bogigian v. Bogigian*, 551 N.E.2d 1149, 1151 (Ind.Ct.App.1990) (citing *Pope v. Vajen*, 121 Ind. 317, 22 N.E. 308 (1889) and *Gates v. Fauvre*, 74 Ind.App. 382, 119 N.E. 155 (1918)). In addition, the parol-evidence rule prohibits courts from considering evidence outside the four corners of an agreement unless the terms of that agreement are ambiguous. *Deckard*, 307 F.3d at 563; *Thomas v. Thomas*, 577 N.E.2d 216, 219 (Ind.1991) ("When a contract is unambiguous, the intent of the parties should be determined by the language employed in the document." (citations omitted)).

In this case, Gonzalez and Holland argue that the language of the releases clearly indicates that they were not supported by consideration. They note that both releases state on their faces that "ZERO ($0.00)" was the "sole consideration" given for the release of claims, and that Indiana's parol- evidence rule prohibits a court from taking notice of any facts beyond this language.

We cannot say, however, that the terms of these release agreements are clear and unambiguous. Certainly, it is not clear why Gonzalez and Holland, counseled by their attorney, would enter into an agreement that would be unenforceable from the beginning. The fact that these releases were drafted to indicate that "ZERO ($0.00)" was given as consideration--a curious statement given that "nothing" generally is not "given" as consideration--suggests that the term was meant to reflect something else, not that the agreements were invalid from the outset. Most likely, the "ZERO

($0.00)" consideration term was included to reflect the fact that no *monetary* consideration was given in exchange for the releases. But at the very least, this term creates an ambiguity in the release agreements that requires the use of parol evidence to interpret the agreements in such a way as to give full effect to the intentions of the parties.

Even when viewed in a light most favorable to the nonmoving parties, the evidence here clearly shows that the releases signed by Gonzalez and Holland were supported by consideration. They bargained for and received dismissal of the criminal charges against them in exchange for their release of any claims they had against the arresting officers or the city. Consideration need not be monetary; the dismissal of criminal charges was certainly something of value to Gonzalez and Holland, especially in light of Gonzalez's concern for his job as a Chicago police officer. *Cf. Dye v. Wargo,* 253 F.3d 296, 301 (7th Cir.2001) (finding a release of § 1983 claims valid under Indiana law because although the § 1983 plaintiff "did not get cash for his settlement ... he did receive value (avoidance of any debt that might hang over him after prison)"). The city lived up to its end of the bargain by consenting to the dismissal of the criminal charges; Gonzalez and Holland cannot now claim that they're not bound to live up to theirs. We find that the release-dismissal agreement here was a valid contract, supported by adequate consideration, under Indiana law.

B. Federal Public Policy

The appellants next argue that even if the releases are valid under Indiana contract law, this release-dismissal agreement is unenforceable as against federally declared public policy. They contend

that Kokot and Dixon have failed to prove that the releases were given voluntarily, that the prosecutor acted improperly to protect the private interests of the police officers despite his knowledge of police misconduct, and that the agreement was not subject to judicial supervision.

The potential for the abuse of release-dismissal agreements has led the Supreme Court to urge the use of a critical eye when courts are asked to enforce them. *See Town of Newton v. Rumery*, 480 U.S. 386, 392-93, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987) . But despite the risk of misuse, as Gonzalez and Holland acknowledge, the Supreme Court has explicitly rejected a rule of *per se* invalidity of these agreements. *Id.* at 392, 107 S.Ct. 1187. Rather, the Court noted that while "in some cases these agreements may infringe important interests of the criminal defendant and of society as a whole," *id.* at 392, 107 S.Ct. 1187, in general release-dismissal agreements "may further legitimate prosecutorial and public interests," *id.* at 397, 107 S.Ct. 1187 (plurality opinion). The Court therefore chose to follow, in Justice O'Connor's words, "a case-by-case approach [, which] appropriately balances the important interests on both sides of the question of the enforceability of these agreements." *Id.* at 399, 107 S.Ct. 1187 (O'Connor, J., concurring).

According to *Rumery*, before enforcing a release-dismissal agreement, a court must find that the agreement was "voluntary, that there [was] no evidence of prosecutorial misconduct, and that enforcement of this agreement would not adversely affect the relevant public interests." *Id.* at 398, 107 S.Ct. 1187. The burden of proving the validity of a release-dismissal agreement is on the party seeking to enforce the agreement. *See id.* at 399, 107 S.Ct. 1187 (O'Connor, J., concurring) ("[I]t is the burden of those

relying upon such covenants to establish that the agreement is neither involuntary nor the product of an abuse of the criminal process."). Justice O'Connor's concurring opinion in *Rumery* provides additional guidance as to the types of factors a court should examine when determining the validity of a particular release-dismissal agreement:

> Many factors may bear on whether a release was voluntary and not the product of overreaching, some of which readily come to mind. The knowledge and experience of the criminal defendant and the circumstances of the execution of the release, including, importantly, whether the defendant was counseled, are clearly relevant. The nature of the criminal charges that are pending is also important, for the greater the charge, the greater the coercive effect. The existence of a legitimate criminal justice objective for obtaining the release will support its validity. And, importantly, the possibility of abuse is clearly mitigated if the release-dismissal agreement is executed under judicial supervision.

Id. at 401-02, 107 S.Ct. 1187 (O'Connor, J., concurring). We now turn to an examination of these factors in this case.

1. *Voluntariness*

According to the Court in *Rumery*, a valid release-dismissal agreement must be the result of "an informed and voluntary decision." *Id.* at 393, 107 S.Ct. 1187. In that case, the Court focused on several

factors in evaluating whether the agreement at issue had been entered into voluntarily. The Court noted that Rumery was a "sophisticated businessman," that he was not in jail at the time he signed the release, that he was counseled by "an experienced criminal lawyer," and that the benefits of the agreement to Rumery were "obvious." *Id.* at 394, 107 S.Ct. 1187. Taken together, these factors indicated that Rumery had "voluntarily waived his right to sue under § 1983 ." *Id.*

While the decision in *Rumery* requires that release-dismissal agreements be the result of voluntary decisions, neither the Supreme Court nor this Court have yet addressed the question as to what standard of proof is required to prove the voluntariness of a release-dismissal agreement. Several circuits have previously addressed this question, coming to different conclusions as to what the standard should be.

The Third Circuit has held that the voluntariness of an oral release-dismissal agreement, like the agreement at issue in this case, must be proven by clear and convincing evidence. *See Livingstone v. North Belle Vernon Borough,* 91 F.3d 515, 535-36 (3d Cir.1996) . The Third Circuit reasoned that a heightened standard of proof was necessary because release-dismissal agreements "implicate 'important individual interests or rights' "--namely, the redressing of possible constitutional-rights violations. *Id.* at 535 (quoting *Grogan v. Garner,* 498 U.S. 279, 286, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991)). In addition, a clear and convincing standard was thought to provide "the salutary effect of reducing the overall risk of misunderstandings in the conclusion of release-dismissal agreements, and increasing the

accuracy of juries' decisions as to whether a release-dismissal agreement was concluded voluntarily." *Id.* at 536.

The Sixth Circuit reached a different conclusion, holding that voluntariness need only be proven by a preponderance of the evidence. *See Burke v. Johnson,* 167 F.3d 276, 285 (6th Cir.1999) . In *Burke,* the court addressed the voluntariness of an oral release-dismissal agreement read into the record at a plea hearing. While the court noted that an on-the-record agreement presented less serious problems of proof than an oral agreement like the kind addressed by the Third Circuit in *Livingstone,* it went on to observe that a preponderance-of-the-evidence standard is considered sufficient for determining the voluntariness of waivers of other constitutional rights. *Id.* at 284-85 (noting that a preponderance standard is used to determine the voluntariness of a waiver of *Miranda* rights, the voluntariness of a confession, and the involuntariness of a guilty plea attacked in a habeas proceeding). The court then concluded that, "[i]f a preponderance of evidence standard applies when determining if there is a voluntary waiver of a criminal defendant's constitutional rights, we see no reason for application of an elevated standard where lesser rights are implicated." *Id.* at 285.

We agree with the Sixth Circuit that the voluntariness of a release-dismissal agreement need only be proved by a preponderance of the evidence. The preponderance standard is sufficient to ensure that a release of claims is entered into voluntarily, just as it has proven sufficient for determining the voluntariness of waivers of constitutional rights. In addition, the burden of proving voluntariness remains on the party seeking to invoke the agreement, further

safeguarding against coerced or involuntary releases.

Under a preponderance standard, it is apparent that the releases signed by Gonzalez and Holland were the product of voluntary and informed decisions. The record indicates that Gonzalez and Holland signed the releases as the result of a voluntary choice, with a full understanding of the consequences. Gonzalez, as a Chicago police officer, undoubtedly had an understanding of the criminal-justice process. Both Gonzalez and Holland were represented by counsel who had actively bargained with the prosecutor for a dismissal of charges, and the possibility of a release-dismissal agreement had been under discussion for a significant period of time, giving Gonzalez and Holland--and their attorney--ample time to consider the consequences of signing the releases. Gonzalez and Holland had their attorney present when they actually signed the releases. And the benefits of the release-dismissal agreement to Gonzalez especially are obvious: he avoided potential problems with his job as a Chicago police officer. Given these facts, considered in light of *Rumery,* the execution of these releases was neither involuntary or uninformed.

2. *Legitimate Prosecutorial Conduct*

Also important to the Supreme Court's analysis in *Rumery* was the fact that "the prosecutor had an independent, legitimate reason to make this [release-dismissal] agreement directly related to his prosecutorial responsibilities." *Rumery,* 480 U.S. at 398, 107 S.Ct. 1187. Such a legitimate reason ensures that the prosecutor acts consistent with his duties to uniformly enforce the criminal law, rather than as the agent for the private interests of potential § 1983 defendants. In this case, we believe that the

prosecutor did not engage in any improper conduct inconsistent with his role as prosecutor, nor were his efforts in securing the releases from Gonzalez and Holland the result of any prosecutorial overreaching.

First, the prosecutor did not act improperly when he pursued the charges against Gonzalez and Holland. The appellants go to great lengths to argue that the pursuit of charges against them was wholly unjustified. In disputing the disorderly conduct charge, they admit that Gonzalez was yelling, but argue that it was not "at the top of top of [*sic*] his lungs." In challenging the charges of resisting law enforcement, they admit that they offered some resistance during the arrest attempt, but that their resistance was not "forcible." They also point to inconsistent accounts given by Officers Kokot and Dixon in their depositions as evidence of misconduct and apparent complicity by the prosecutor in ignoring the inconsistencies. But as the Sixth Circuit has noted, "the existence of discrepancies among the accounts of prosecution witnesses does not amount to 'substantial evidence' of police misconduct such that an inference of prosecutorial misconduct" arises. *Burke,* 167 F.3d at 286. Even accepting Gonzalez's and Holland's characterization of the charges, we believe that there was enough evidence to send the criminal case to the trier of fact. The charges brought against Gonzalez and Holland were certainly not "unfounded criminal charges used as bargaining chips to cover up police misconduct." *Id.* (quotations omitted).

Second, the prosecutor did not abandon his responsibilities in securing the releases from Gonzalez and Holland. Prosecutors may legitimately consider the strength of the defendants' § 1983 claims when considering whether to enter into a release-dismissal agreement. See Rumery, 480 U.S. at 396, 107 S.Ct.

1187 (plurality opinion) ("To the extent release-dismissal agreements protect public officials from the burdens of defending such unjust [§ 1983] claims, they further this important public interest."); *id.* at 399, 107 S.Ct. 1187 (O'Connor, J., concurring) ("[T]here are substantial policy reasons for permitting release-dismissal bargains to be struck in appropriate cases. Certainly some § 1983 litigation is meritless, and the inconvenience and distraction of public officials caused by such suits is not inconsiderable."). We cannot say that it would have been inappropriate for Prosecutor Kray (as well as Gonzalez and Holland themselves) to have considered the strength of the § 1983 case in deciding whether or not to enter into a release-dismissal agreement.

In addition, the plurality opinion in *Rumery* noted that "[p]rosecutorial charging decisions are rarely simple." *Id.* at 396, 107 S.Ct. 1187 (plurality opinion). Prosecutors must consider the strength and importance of a particular case, government enforcement priorities, and the appropriate allocation of scarce prosecutorial resources. *Id.* Justice O'Connor's concurring opinion in *Rumery* notes that "[s]paring the local community the expense of litigation associated with some minor crimes for which there is little or no public interest in prosecution may be a legitimate objective of a release-dismissal agreement." *Id.* at 399-400, 107 S.Ct. 1187 (O'Connor, J., concurring) (citation omitted). In this case, prosecutor Kray testified in his deposition that "[t]his was a very minor case that got out of hand." (Kray Dep. at 10.) Avoiding a potentially costly and lengthy trial over relatively minor matters, with a settlement that was acceptable to both sides, was certainly a legitimate goal related to Kray's duties as a prosecutor.

3. *The Public Interest*

Finally, we cannot say that enforcement of the releases in this instance will be to the detriment of any public interest. The plurality opinion in *Rumery* noted that release-dismissal agreements might "tempt prosecutors to trump up charges in reaction to a ... civil rights claim, suppress evidence of police misconduct, and leave unremedied deprivations of constitutional rights." *Id.* at 394, 107 S.Ct. 1187 (quotation omitted) (plurality opinion). These agreements thus raise the potential of harm to the public's interests in the proper and uniform enforcement of criminal laws and in seeing episodes of police misconduct adequately addressed.

We see no evidence of harm to either of these public interests by the enforcement of the releases signed by Gonzalez and Holland. As discussed above, the charges against them were not trumped up in response to their § 1983 suit; the record indicates that there were colorable cases against each. Nor does the record indicate that Gonzalez and Holland will be left with any significant constitutional violations unredressed. They did, after all, receive something of value in exchange for the dismissal of their § 1983 claims: the dismissal of the criminal charges against them and the avoidance of the time and expense of a criminal trial.

The lack of judicial supervision is also not fatal to this agreement's enforceability. The *Rumery* Court acknowledged that while "it would be helpful to conclude release-dismissal agreements under judicial supervision .... such supervision is not essential to the validity of an otherwise proper agreement." *Rumery*, 480 U.S. at 398 n. 10, 107 S.Ct. 1187. Because we find that the release-dismissal agreement

at issue in this case was entered into voluntarily, without evidence of prosecutorial overreaching, we do not believe that the lack of judicial supervision by itself renders these releases unenforceable. Rather, we believe Kokot and Dixon have adequately demonstrated that the agreement comports with public policy.

III. Conclusion

The releases signed in this case were part of a contractually valid release- dismissal agreement, fully consistent with considerations of public policy. Because we find them valid and enforceable, the releases must serve to bar this § 1983 suit. The grant of summary judgment in favor of Officers Kokot and Dixon is AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

ROBERTO GONZALEZ,	)	
and GLORIA HOLLAND,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**No. 2:01cv0304 AS**
	)	
NICHOLAS KOKOT, and	)	
DEVERICK DIXON,	)	
	)	
Defendants	)	

MEMORANDUM AND ORDER

The complaint in this case was filed by Roberto Gonzalez and Gloria Holland in the Hammond division of this Court by counsel on or about April 19, 2001. On or about June 5, 2001, the Chief Judge of this Court reassigned this case to the undersigned Judge. This Court takes note of the proceedings had in a pretrial conference in open court in South Bend, Indiana on October 15, 2001, and further takes note of the motion by the defendant Deverick Dixon, for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (Fed.R.Civ.P.) filed on November 13, 2001, along with a memorandum and two depositions. The response was filed by the plaintiffs on December 12, 2001.

In this case, the plaintiff initially attempted to file claims within 42 U.S.C. Section 1983, invoking this Court's federal question subject matter jurisdiction under 28 U.S.C. Sections 1331 and 1343(3). It is also worthy of note that Deverick Dixon

has legally changed his name to Janci Mumba. Notwithstanding that, and only as a matter of convenience, the Court will continue to refer to this defendant as Deverick Dixon. The issue here is a preliminary one, but is very important particularly as to the defendant Dixon. The issue is whether there has been a release of the claims of Gonzalez and Holland.

The incidents in question occurred on August 10, 1999, and occurred on Drummond Avenue in the city of East Chicago, Indiana. These two police officers were dispatched to an address on that street in that city. Apparently, when these police officers arrived there was wood on the street in front of the house, and these two police officers began to move it to a grassy parkway between the sidewalk and the curb. There is some dispute about what may have happened next, but it is alleged that the plaintiff Gonzalez opened the door of the house at that location and protested to the police. Things apparently fast-forwarded very quickly and Gonzalez was arrested for disorderly conduct and resisting law enforcement. His companion, Gloria Holland, also a plaintiff in this case, also was arrested for resisting law enforcement. Gonzalez and Holland each allege that they were arrested without probable cause, and that excessive force was used to effect the arrest, in violation of their rights particularly under the Fourth Amendment of the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

It is undisputed that the Fourth Amendment of the Constitution of the United States has been incorporated into the Fourteenth Amendment of the Constitution of the United States and made applicable and binding on the states. *See Mapp v. Ohio*, 367 U.S. 643 (1961). The defendant Dixon did admit that he moved certain wood and concrete from the street in front or near the address in question. However, defendant Dixon denies the use of excessive force or the lack of probable cause. Gonzalez was arrested for disorderly conduct under Indiana Code 35-45-1-3(2), and for resisting law enforcement under IC 35-44-3-3(1). These charges were made in the East Chicago City Court. A lawyer named Schlesinger represented both Gonzalez and Holland in the criminal proceeding in that city court. Schlesinger took depositions of the two police officers regarding this, interviewed two other police officers and requested documents. Schlesinger also served a notice of tort claims against the city of East Chicago under IC 34-13-3 et seq. That notice was served on the Office of City Attorney of East Chicago. Negotiations were apparently had between Schlesinger and Gerald P. Cray, the acting prosecutor in the city court case.

The outline of the negotiations which resulted in the execution of signed written releases speaks well for the way in which law was practiced by all concerned in this matter. This Court has no doubt whatsoever that these plaintiffs executed these releases freely and voluntarily and with the advice of counsel, and that these releases are valid and enforceable. *Town of Newton v. Rumery*, 480 U.S. 386 (1987). The reference to "0" does not in any was undermine the validity of these releases. *See Dye v. Wargo*, 253 F.3d 296 (7th Cir. 2001). Therefore, summary judgment shall enter against the plaintiffs and in favor of the defendant Dixon. The Clerk shall

enter judgment accordingly, and each party shall bear its own costs. This case will go forward as to the defendant Kokot. **IT IS SO ORDERED.**

DATED: December 19, 2001

[Signature]
ALLEN SHARP, JUDGE
UNITED STATES DISTRICT COURT

United States District Court
Northern District of Indiana

ROBERTO GONZALEZ and
GLORIA HOLLAND
Plaintiffs

JUDGMENT IN A CIVIL CASE

v.

Case No. 2:01-CV-304 AS

NICHOLAS KOKOT and
DEVERICK DIXON
Defendants

[ ] **Jury Verdict**. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court**. This action came to trial, hearing or consideration before the Court. The issues have been tried, heard or considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered against the plaintiffs and in favor of the defendant Dixon; each party to bear its own costs. The case will go forward as to the defendant Kokot.

Stephen R. Ludwig, Clerk
By [Signature]
Deputy Clerk

Equivalent Coupon Issue Yield: N/A
This document is entered pursuant to Rules 79(a) and 58 of the Federal Rules of Civil Procedure on **December 20, 2001.**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

ROBERTO GONZALEZ, and GLORIA HOLLAND,	)	
Plaintiffs,	)	
vs.	)	CASE NO.2:01CV 304 AS
NICHOLAS KOKOT and DEVERICK DIXON,	)	
Defendants,	)	

ORDER

This matter comes before the Court on Defendant Kokot's Motion To Clarify or Amend Judgment Of December 20, 2001. The Court having duly considered the Motion, now FINDS and ORDERS that Defendant Kokot had been joined in Defendant Dixon's Motion For Summary Judgment and is entitled to the same judgment as entered against the Plaintiffs and in favor of the Defendant Dixon. The Court's judgment of December 20, 2001, is hereby ORDERED amended by inserting the phrase *"and the defendant Kokot"* after the word *"Dixon"* and deleting the second sentence thereof.

DATE: 2/19/02

[Signature]
JUDGE

United States District Court
Northern District of Indiana

ROBERTO GONZALEZ and
GLORIA HOLLAND
Plaintiffs

AMENDED
JUDGMENT IN A CIVIL CASE

v.

Case No. 2:01-CV-304 AS

NICHOLAS KOKOT and
DEVERICK DIXON
Defendants

[ ] **Jury Verdict**. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court**. This action came to trial, hearing or consideration before the Court. The issues have been tried, heard or considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered against the plaintiffs and in favor of the defendant Dixon and the defendant Kokot; each party to bear its own costs.

Stephen R. Ludwig, Clerk
By [Signature]
Deputy Clerk

Equivalent Coupon Issue Yield: N/A
This document is entered pursuant to Rules 79(a) and 58 of the Federal Rules of Civil Procedure on **February 20, 2002.**

Supreme Court, U.S.
FILED
MAY 2 2003
CLERK

No. 02-1468

In The

Supreme Court of the United States

ROBERTO GONZALEZ and GLORIA HOLLAND,

Petitioners,

v.

NICHOLAS KOKOT and DEVERICK DIXON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE PARTIES PURSUANT TO RULE 29.6

The Petitioners are Roberto Gonzalez and Gloria Holland. The Respondents are Nicholas Kokot and Deverick Dixon, now known as Yanci Mumba. There are no corporate parties.

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STATEMENT OF THE CASE

I. Procedural History of the Case

Petitioners Roberto Gonzalez and Gloria Holland (plaintiffs below, hereinafter "Petitioners") were arrested and charged with disorderly conduct and with forcibly resisting, obstructing or interfering with a law enforcement officer. Respondents Nicholas Kokot and Deverick Dixon (defendants below) were the arresting police officers of the City of East Chicago, Indiana. The Petitioners filed tort claim notices required under Indiana law (Indiana Code § 34-13-3-8) with the City alleging false arrest, excessive force under state law and for violation of their civil rights under the Fourth Amendment through 42 U.S.C. § 1983. After discussing the criminal case and after consulting with the Petitioners' counsel and the Respondents, the prosecutor dismissed the claims against the Petitioners with the understanding that the Petitioners would not pursue charges against the Respondent officers.

A year later, the Petitioners filed suit against the Respondents in the United States District Court under 42 U.S.C. § 1983 for alleged violations of the Petitioners' civil rights. Respondent Dixon moved for summary judgment in which Respondent Kokot was granted leave to join. Respondents' summary judgment motion examined the factors enumerated by the Supreme Court in *Town of Newton v. Rumery*, 480 U.S. 368, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987), and argued that the releases were enforceable because they were (1) voluntary and (2) did not adversely effect the relevant public interests. Petitioner responded, claiming: (1) that the Court should use a clear and convincing evidence standard when deciding whether the release agreement was enforceable; (2) that

the Court should not look beyond the four corners of the release agreement to the underlying facts surrounding the reason for the release agreement; (3) that the release agreement was given without consideration; and (4) that the agreement violated public policy.

The District Court, per Judge Allen Sharp, granted summary judgment in favor of the Respondents. On April 15, 2002, Petitioners filed their appeal in the United States Court of Appeals for the Seventh Circuit. Briefs were filed on both sides, and the case was argued before the Court of Appeals on September 20, 2002. On December 27, 2002, the Court of Appeals for the Seventh Circuit affirmed the District Court's grant of summary judgment in favor of the Respondents. The Petitioners filed their Petition for Writ of Certiorari on March 27, 2003. The Petition states two reasons for granting the Writ: (1) conflict among the circuits as to the means for determining when release-dismissal agreements for civil rights claims are void as against public policy; and (2) conflict among the circuits as to the acceptable burden of proof needed to establish the enforceability of release-dismissal agreements of civil rights claims.

II. Factual History of the Case

On August 10, 1999, officers Deverick Dixon and Nicholas Kokot were dispatched to an address on Drummond Avenue in the City of East Chicago, Indiana. The Respondent police officers arrived and began to take wood that was in the street in front of the home out of the street and placed it in the grassy parkway between the sidewalk and the curb. Although there is conflict as to exactly what happened next, Petitioner Gonzalez opened the door of the

home and protested to the officers. Things apparently got out of hand and Gonzalez ended up under arrest for disorderly conduct and resisting law enforcement. His companion, Gloria Holland, was also arrested for resisting law enforcement. Gonzalez and Holland allege that they were arrested without probable cause and that excessive force was used to effect the arrest in violation of rights guaranteed to the Petitioners under the Fourth and Fourteenth Amendments to the United States Constitution.

In answering the Complaint, Respondent Dixon admitted that he moved certain wood and concrete forms from the street in front of or near said address, but denied all of the allegations of the Complaint concerning excessive force, arrest without probable cause, and constitutional violations. However, Dixon pleaded an affirmative defense in the form of two written releases of liability signed by Petitioners Gonzalez and Holland, respectively, which were attached to Dixon's Answer as Exhibits A and B. Dixon alleged that the releases bar the imposition of any liability against him under the Petitioners' Complaint.

Gonzalez was arrested for disorderly conduct pursuant to I.C. § 35-45-1-3(2) and resisting law enforcement forcibly under I.C. § 35-44-3-3(1). The charges were brought in East Chicago City Court. Jeffery Schlesinger, an attorney with offices in Crown Point, Indiana, represented Gonzalez and Holland in the criminal proceedings in East Chicago. Although filed in City Court, the charges arose under state law, and Gerald P. Kray, a Deputy Prosecuting Attorney for Lake County, Indiana, was assigned the prosecution of Gonzalez and Holland.

Schlesinger, after commencing his representation, investigated the matter and took depositions of the Respondent police officers together with the training officer of the East Chicago Police Department. He also interviewed at least two other officers, and he served a Request for Production of Documents upon the Prosecutor. Schlesinger also served a Notice of Tort Claim against the City of East Chicago pursuant to I.C. § 34-13-3-8 *et seq*. on or about February 28, 2000, alleging that Respondents Dixon and Kokot, without probable cause, arrested both Gonzalez and Holland and used excessive force in doing so, violating their constitutional rights. The Tort Claim Notice was served upon the Law Department of the City of East Chicago. This was the only communication which Schlesinger had on behalf of his client with the City concerning claims.

Kray, who had been Deputy Prosecutor assigned to the East Chicago City Court since April of 1990, was told by Schlesinger that Petitioners were about to serve a tort claim notice early in the prosecution. It was Kray's practice to notify the Law Department of the City of East Chicago whenever he learned that a claim against the City would be filed. He did this by calling Roy Dominguez, Corporation Counsel of the City of East Chicago. Kray recalled discussing nothing with Dominguez other than putting him on notice that a claim was going to be filed by Schlesinger. Kray testified that Dominguez requested nothing of him in connection with the criminal cases from the City of East Chicago. According to Kray, it was Schlesinger who offered releases of liability signed by his client if Kray would go along with a plea agreement involving either conditional discharge or a deferral of plea leading to an outright dismissal.

Kray did not demand releases as a term of the plea bargain, nor was it his practice to suggest releases in this situation. However, he made it his policy to obtain the consent of the arresting police officers to plea agreements reached in cases involving their arrests. In this case, Kray testified that officers Kokot and Dixon wanted the releases because of the pending tort claim, and that they probably would not have approved of any plea agreement without releases.

Schlesinger, on the other hand, testified that Kray indicated to him that it was the City of East Chicago that was requiring releases and that the releases were prepared by the City Law Department and forwarded directly to Schlesinger. Schlesinger did not think Kray discussed the releases at all with Dominguez. After Schlesinger initiated discussion on a plea agreement, he told Kray that Gonzalez was a police officer in Chicago, Illinois who was already having problems with Chicago Police Internal Affairs and that he wanted to develop a plea agreement that would result in an outright dismissal of the case. Schlesinger stated that Gonzalez could not afford to have a pending criminal case against him, even if a plea of guilty could be avoided. While Schlesinger contended that Kray told him that the City was requiring releases of liability in order to obtain the dismissals, Schlesinger testified that he did not believe that Kray told him that execution of the releases was a condition to obtaining the plea agreement. However, Schlesinger also testified that when he received the release forms from the City Law Department, it was with the understanding that execution of the releases was required in order for the state to approve the plea bargain. Kray testified that officers Dixon and Kokot were willing to consent to dismissal of the criminal charges against

Gonzalez and Holland provided that they were given releases of liability to protect them against the Petitioners' Tort Claims. As Kray explained it, he was not going to dismiss the case without the release of the police officers: " . . . if we were going to do this for him and basically save his career, well, then he wasn't going to go after the East Chicago officers. Moreover, that was the thought process of this whole agreement quite honestly."

The releases, once received by Schlesinger from the City Law Department, were presented to his clients. The clients executed them and Schlesinger delivered the executed releases to Kray in court on the day of disposition. Kray then mailed the completed releases back to Dominguez.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. The Supreme Court Has Already Determined the Means Used to Determine the Validity of a Release-Dismissal Agreement.

Petitioners first argue that the this Court should grant a Writ of Certiorari because the two-pronged test developed by the Third Circuit is in conflict with the test used by the Seventh Circuit in affirming the judgment of the District Court.

However, in *Town of Newton v. Rumery*, 480 U.S. 368, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987) this Court already addressed the issue of the means used to determine whether a release of civil rights claims are valid when given in exchange for the dismissal of criminal charges. While this Court has noted "that some release-dismissal

agreements may not be the product of an informed and voluntary decision" (*Rumery*, 480 U.S. at 393), the Court also refused to hold that such agreements were *per se* invalid as against public policy. *Rumery*, 480 U.S. at 393. Instead, the Court elected to employ, as noted by Justice O'Connor, a case-by-case approach, which appropriately balances the important interests at stake. *Rumery*, 480 U.S. at 399 (J. O'Connor concurring).

In *Rumery*, the majority noted that many times "a Respondent's choice to enter into a release-dismissal agreement will reflect a highly rational judgment that the certain benefits of escaping the criminal prosecution exceed the speculative benefits of prevailing in a civil action." *Rumery*, 480 U.S. at 394. In examining the release-dismissal agreement in *Rumery*, the Court examined the entirety of the facts and circumstances surrounding the case to determine the validity of the release-dismissal agreement. The majority in *Rumery* specifically noted that the Petitioner was a sophisticated businessman, was not in jail at the time the release was obtained, and was represented by an experienced criminal attorney, who drafted the agreement. *Rumery*, 480 U.S. at 394. In concluding that the release-dismissal agreement in *Rumery* was valid, the Court stated that the agreement was voluntary, that there was no evidence of prosecutorial misconduct, and that enforcement of the agreement would not adversely affect relevant public interests.

Petitioners have characterized the Seventh Circuit test as one which, in part, looks to see whether there was enough evidence to send the criminal case to trial. The Petitioners further argue that the release of the excessive force claim "is entirely inapplicable" because excessive

force is not related to whether the criminal charges were colorable or triable.

Petitioners have painted a fuzzy picture of the Seventh Circuit's decision in this case. The Seventh Circuit looked at three (3) aspects of the release-dismissal agreement to find that the agreement was valid and affirm the District Court's ruling. First, the Seventh Circuit examined the voluntariness of the Petitioners' acceptance of the agreement. *Gonzalez v. Kokot*, 314 F.3d 311, 318-319 (7th Cir.2002). In reaching its conclusion that the release-dismissal agreement was signed voluntarily by the Petitioners, the Court of Appeals noted that: (1) Gonzalez, a Chicago police officer, had an understanding of the criminal justice process; (2) both Petitioners were represented by counsel; (3) the Petitioners' counsel actively bargained for the release-dismissal agreement with the prosecutor; (4) counsel was present when the release-dismissal agreement was signed; and (5) the release-dismissal agreement was signed after considerable time had elapsed, giving both the Petitioners and their counsel in the criminal proceeding enough time to weigh the consequences of their decision. *Gonzalez*, 314 F.3d at 319.

Next, the Seventh Circuit focused on the question of whether the prosecutor had a legitimate reason to agree to the release-dismissal agreement. *Gonzalez*, 314 F.3d at 319-320. Here, the Seventh Circuit focused on the arguments raised by the Petitioners that the minor charges brought against them were "wholly unjustified." *Gonzalez*, 314 F.3d at 319. However, the Court of Appeals, after examining the facts surrounding the arrest, noted that the minor charges brought against the Petitioners were "supported by enough evidence to send the criminal case to the trier of fact." *Gonzalez*, 314 F.3d at 319-320. As such,

the charges against the Petitioners, "were certainly not 'unfounded criminal charges used as bargaining chips to cover up police misconduct.'" *Gonzalez*, 314 F.3d at 320; citing *Burke v. Johnson*, 167 F.3d 276, 286 (6th Cir.1999). Having concluded that the charges were supported by evidence, the Seventh Circuit also addressed whether the prosecutor conformed with his duties when securing the release-dismissal agreement. *Gonzalez*, 314 F.3d at 320. The Seventh Circuit, after extensively quoting the plurality opinion and Justice O'Connor's concurring opinion in *Rumery*, determined, "Avoiding a potentially costly and lengthy trial over relatively minor matters, with a settlement that was acceptable to both sides, was certainly a legitimate goal related to Kray's duties as a prosecutor." *Gonzalez*, 314 F.3d at 320.

Finally, the Court of Appeals addressed the issue of whether the release-dismissal agreement violated public policy. *Gonzalez*, 314 F.3d at 320-321. The Court concluded it did not. *Gonzalez*, 314 F.3d at 321. In examining this issue, the Seventh Circuit inquired whether the release-dismissal agreement raised "the potential of harm to the public's interest in the proper and uniform enforcement of criminal laws and in seeking episodes of police misconduct adequately addressed." *Gonzalez*, 314 F.3d at 321. The Court found no evidence that either of these two important public policies was violated, and noted that the Petitioners did "received something of value in exchange for the dismissal of their § 1983 claims: the dismissal of the criminal charges against them and the avoidance of the time and expense of a criminal trial." *Gonzalez*, 314 F.3d at 320-321.

The Seventh Circuit found that the release-dismissal agreement in this case was "entered into voluntarily,

without evidence of prosecutorial overreaching" and was "fully consistent with considerations of public policy." *Gonzalez*, 314 F.3d at 321. This is a conclusion similar to the conclusion reached by the majority of this Court in *Rumery*, 480 U.S. at 398.

In summation, a Writ of Certiorari should not be granted as to Petitioner's First Ground because this Court has already effectively stated the means for determining the validity of a release dismissal agreement in *Rumery*, and the Seventh Circuit used the proper analysis in affirming the District Court's decision.

II. Changing the burden of proof from the preponderance of the evidence standard to the clear and convincing evidence standard will not change the outcome in this case.

The Petitioners also argue that this Court should grant a Writ of Certiorari because the Federal Courts of Appeals are divided over the issue of the burden of proof necessary to determine the validity of a release-dismissal agreement. The Third Circuit has determined that the validity of an oral release-dismissal agreement should be determined by a clear and convincing evidence standard. *Livingstone v. North Belle Vernon Borough*, 91 F.3d 515, 534-535 (3rd Cir.1996). However, the Sixth and Seventh Circuits have determined that the validity of release-dismissal agreements should be determined by the preponderance of the evidence standard. *Gonzalez*, 314 F.3d at 319; *Burke v. Johnson*, 167 F.3d 276, 286 (6th Cir.1999).

In *Livingstone*, however, the release-dismissal agreement was an oral agreement, while in this case the agreement was written. The sort of problems inherent in

establishing a valid oral agreement are not present when the agreement is in writing. As such, there is no clear division among the Courts of Appeals as to the burden of proof necessary to prove that a written release-dismissal agreement is valid and enforceable.

Even if *Livingstone* were applicable to written release-dismissal agreements, the application of the clear and convincing evidence standard would not change the outcome of this case.

The District Court granted summary judgment in favor of the Respondents noting, "This Court has no doubt whatsoever that these Petitioners executed these releases freely and voluntarily and with the advice of counsel, and that these releases are valid and enforceable." Order of the District Court dated December 19, 2001. In affirming the District Court's order, the Court of Appeals stated, "The releases signed in this case were part of a contractually valid release-dismissal agreement, fully consistent with considerations of public policy." *Gonzalez*, 314 F.3d at 321.

The Petitioners are not seeking to overcome any of the factual determinations made by the District Court or the Court of Appeals. Instead, the Petitioners pray that by changing the evidentiary standard used by the Court of Appeals from a "preponderance of the evidence" standard to a "clear and convincing" evidence standard, the outcome of the summary judgment ruling will, somehow, be different.

This Court has stated, "[I]n ruling on a motion for summary judgment, the judge must view the evidence

presented through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 1016 S.Ct. 2505, 91 L.Ed.2d 202 (1986).[1] At the summary judgment stage of the proceedings, the District Court is not to weigh the evidence to find the truth of the matter, but determine whether there is a genuine issue for trial. There is no issue for trial unless there is sufficient evidence from which a jury could find in favor of the nonmoving party. *Anderson*, 477 U.S. at 249.

On a motion for summary judgment in the usual civil case, the District Court Judge must ask whether the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. *Anderson*, 477 U.S. at 252. In these cases, the District Judge's inquiry then must be "whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Anderson*, 477 U.S. at 252. Even if the Petitioners were correct, the District Court's inquiry then would become whether reasonable jurors could find by clear and convincing evidence that the plaintiff is entitled to a verdict.

"'The burden of showing something by a preponderance of the evidence . . . simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" *Metropolitan Stevedore Co. v. Rambo*,

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[1] Justice Brennan, now-Chief Justice Rehnquist, and Chief Justice Burger dissented from this holding.

521 U.S. 121, n. 9, 117 S.Ct. 1953, 138 L.Ed.2d 327 (1997); quoting *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 622, 124 L.Ed.2d 539, 113 S.Ct. 2264 (1993). The preponderance standard goes to how convincing the evidence in favor of a fact must be in comparison with the evidence against it. *Rambo*, 521 U.S. 121, n. 9. This burden allows the parties to bear the risk of error fairly equally. *Rambo*, 521 U.S. 121, n. 9.

On the other hand, clear and convincing evidence has been described as evidence which creates a belief in the trier of fact that a fact or an element of a claim is highly probable or creates a firm belief or conviction that the allegation in question is true. 29 *Am.Jur.*2d Evidence § 157. During the summary judgment stage of a proceeding, this Court has characterized clear and convincing evidence to mean, "convincing clarity." *Anderson*, 477 U.S. at 254.

In this case, the facts that that could be presented to the jury remain unchanged. In the negotiation and execution of the release-dismissal agreement, counsel represented both Petitioners. Petitioner Gonzalez was an officer with the Chicago Police Department who "undoubtedly had an understanding of the criminal justice process." *Gonzalez*, 314 F.3d at 319. Counsel for both Petitioners actively bargained for the dismissal of the charges. The negotiations process between Petitioners' Counsel and the Prosecutor took place over a "significant period of time." *Gonzalez*, 314 F.3d at 319. Petitioners had their attorney present when they actually signed the releases. Further, "the benefits of the release-dismissal agreement to Gonzalez especially are obvious: he avoided potential problems

with his job as a Chicago Police Officer." *Gonzalez*, 314 F.3d at 319.

These facts not only meet the preponderance standard, but also show with convincing clarity that Petitioners signed the release dismissal agreement voluntarily. Not only is it highly probable that the releases are valid and enforceable, there can be "no doubt whatsoever that these plaintiffs executed these releases freely and voluntarily and with the advice of counsel." Order of the District Court dated December 19, 2001, p. 3.

Although a higher standard of proof may produce different results in some trials, in many cases it will not. *Anderson*, U.S. at 254; noting the opinion in *U.S. v. Taylor*, 464 F.3d 240, 243 (2nd Cir. 1972). In regard to this case, changing the standard of proof from preponderance to clear and convincing evidence will not change the outcome.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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